

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-17 ✓

In the Matter of

Amendment of Section 90.631
of the Commission's Rules and
Regulations Concerning Loading
Requirements for 900 MHz
Trunked SMR Stations

RM-7827

NOTICE OF PROPOSED RULE MAKING

Adopted: January 30, 1992; Released: February 18, 1992

Comments: March 11, 1992

Reply Comments: March 23, 1992

By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rule Making (Notice)* we initiate a proceeding to examine whether Specialized Mobile Radio (SMR) licensees in the 896-901/935-940 MHz (900 MHz) band should be granted limited relief from the loading requirements of Section 90.631(b) of the Rules, 47 C.F.R. § 90.631(b). On June 26, 1991, the National Association of Business and Educational Radio, Inc. (NABER) filed a petition for rule making to amend Section 90.631 of the Rules to extend the five-year loading deadline for 900 MHz SMR licensees by two years. NABER recommends that, in the eight largest urban markets, this extension be available only to licensees that can demonstrate loading of at least 20 mobiles per channel (20 percent of the required 100 mobiles per channel) five years from the date of license grant.

II. BACKGROUND

2. Trunked systems are authorized based on a loading level of 100 mobiles per channel. Section 90.631 of our Rules requires applicants for trunked systems to certify that they will load their systems to at least 70 percent of this level (70 mobiles per channel) within five years of their license grant.¹ In accordance with Section 90.631(b) of our Rules, if all the channels in a licensee's radio service category are assigned within the system's geograph-

ic area, failure to load the system to 70 percent within the first five years results in automatic cancellation of any channels not loaded to 100 mobile units.

3. In 1987, the Commission began licensing the 399 channels in the 896-901/935-940 MHz band in accordance with the procedures established in Gen. Docket No. 84-1233² and a November 4, 1986, public notice entitled "Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands."³ Two hundred of the channels were set aside for SMR operations. To expedite 900 MHz SMR service to areas most in need, applications were only accepted within 46 designated filing areas (DFAs) encompassing the 50 top markets in the country. Licenses for SMR systems have been granted within all these DFAs, except for the San Diego, California, DFA where no licenses have been granted pending discussions with Mexico on the use of these channels. Because many licensees of trunked SMR systems failed to construct and place their systems in operation within one year, as required by Sections 90.631(e) and (f) of our Rules, the authorizations of these licensees have cancelled and their channels have been recovered. Licensees that have completed construction and placed their stations in operation within the required one year are presently subject to the loading requirements of Section 90.631(b).

III. DISCUSSION

4. Due to a number of extenuating circumstances unique to the development of the 900 MHz SMR service⁴ NABER asks that the Commission extend the loading deadline for each 900 MHz SMR trunked system by two years, but that within the eight largest urban areas, licensees be required to load their systems to 20 mobiles per channel five years from the date of license grant in order to qualify for the two-year extension. This, NABER states, will allow operators to complete loading of their systems in an orderly manner and will allow the Commission to release spectrum outside of the DFAs without disruption to the continued development of service offerings within the DFAs.

5. The early licensees in the 900 MHz SMR service entered a highly competitive market with full knowledge of the difficulties they might encounter in establishing and expanding their business -- and in meeting our loading requirements. The multi-phase licensing scheme used for 900 MHz SMRs allowed expedited licensing in the major metropolitan areas. This licensing scheme, however, has also kept the 900 MHz SMR industry in the rudimentary stages of development by making it difficult to develop the types of wide-area and regional systems that are characteristic of current competitive SMR offerings. Accordingly, we have concluded that some relief from our loading standards may be appropriate for 900 MHz trunked SMR licensees.

¹ 47 C.F.R. § 90.631.

² Report and Order, Docket 84-1233, 2 FCC Rcd 1825 (1986).

³ Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (PRB 1986).

⁴ According to NABER, these circumstances include 1)

difficulties in the development of suitable 900 MHz equipment, 2) delays in system development resulting from speculation in conjunction with lotteries held to select SMR licensees, and 3) impediments to the development of an effective and competitive 900 MHz SMR service that have resulted from our limiting licensing to the 46 DFAs.

6. We have not granted new 900 MHz SMR licenses for some time, pending resolution of the proceeding in PR Docket 89-553.⁵ It is therefore difficult to gauge demand for 900 MHz SMR channels accurately. NABER believes it appropriate to judge demand by market size and recommends that licensees in the top eight markets be required to show 20 percent loading in order to receive an extension of their loading deadline. While NABER's suggestion is workable, we believe a simpler approach would be more appropriate. We propose merely to extend the loading date for all 900 MHz SMR systems licensed on or before June 30, 1989, by granting these licensees, if otherwise qualified, a two-year renewal and relieving them from the automatic cancellation rule until the expiration of the two-year period.⁶ At the expiration of the two-year renewal, licensees will be required to meet all loading requirements normally associated with the initial five-year license.⁷ Licensees that meet the 70 mobile per channel loading requirements of Section 90.631(b) at the end of their initial five-year license term would receive a standard five-year license renewal.⁸ The proposed relief covers licenses granted during the first two years of 900 MHz SMR licensing.⁹ The difficulties faced in establishing this new service, especially considering the restrictions imposed by our unique multi-phased licensing scheme, were greatest during the early stages of licensing. Subsequent licensees entered a more stable and widely recognized market thereby benefiting from the experiences of previous licensees. Accordingly, we believe that a two-year

loading extension period for early 900 MHz licensees is appropriate to resolve this issue.¹⁰ In the event, however, that the Commission decides not to grant the two-year loading extension, we seek comments on a transition period, or other method, appropriate for 900 MHz SMRs to meet the loading deadlines.

7. With the expiration of the first 900 MHz SMR imminent we recognize the need for immediate action in this matter. Given the uncertainties of a rule making proceeding, however, it is unlikely that final action on this matter will be taken prior to the expiration of some 900 MHz SMR licenses. Accordingly, we are hereby staying any 900 MHz SMR loading deadlines until 90 days from the effective date of a Report and Order in this proceeding.

IV. CONCLUSION

8. Our loading requirements were adopted to serve the public interest by preventing valuable spectrum from remaining fallow. By granting the early 900 MHz SMR licensees some relief from our loading requirements we will further the public interest by allowing the innovators in this new service to continue to operate and further the development of 900 MHz SMR systems.

⁵ See, Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

⁶ Although we have recovered channels in many of the DFAs (see paragraph 3, *supra*), these channels are not available, pending the outcome of PR Docket 89-553. We therefore consider all 900 MHz SMR channels "assigned" in all DFAs and accordingly, all 900 MHz SMR licensees are subject to the loading requirements of Section 90.631(b).

⁷ Currently, in accordance with Section 90.631(b), licensees are only subject to channel recovery for failure to meet loading requirements within five years of the grant of their initial license. After five years a licensee is no longer subject to channel recovery for failing to maintain adequate loading. Licensees receiving relief in accordance with our proposal, however, would not be required to satisfy loading requirements at the end of the five-year period. Instead, affected licensees will be required to satisfy loading requirements at the expiration of the two-year renewal license. The two-year renewal will be considered as part of the initial license term. Therefore, although licenses granted after June 1, 1993 would not normally be subject to loss of channels for failing to meet loading requirements, see Section 90.631(b), licensees obtaining two-year renewals will be subject to the five-year loading requirements of Section 90.631(b) of our Rules regardless of the date of grant. Also, in accordance with Section 90.631(b), a licensee would not lose channels for failing to meet the 70 mobile per channel loading requirement if channels are available in its geographic area at the time of the expiration of the licensee's two-year renewal.

⁸ See 47 C.F.R. § 90.149.

⁹ The first 900 MHz SMR license was granted on May 6, 1987 and will expire on May 6, 1992. Our proposed relief is extended to licenses granted during the two-year period from May, 1987 through June, 1989.

¹⁰ The Special Industrial Radio Service Association, Inc. (SIRSA), the Telephone Frequency Advisory Committee (TELFAC), and the Council of Independent Communication Suppliers (CICS) have submitted a letter dated November 8, 1991, urging the Commission to grant similar relief to 900 MHz

systems licensed in the Industrial/Land Transportation (I/LT) Pool. The situation with respect to 900 MHz I/LT systems, however, is vastly different from that of 900 MHz SMRs. First, unlike 900 MHz SMR systems, growth in the I/LT pool has not been limited by a unique licensing scheme. Licensing of 900 MHz I/LT channels has been consistent with licensing of 800 MHz I/LT channels while licensing of 900 MHz SMRs has been somewhat restricted. The justifications to extend loading for 900 MHz I/LT licensees that are proffered by SIRSA/TELFAC/CICS, such as difficulties in acquiring suitable equipment, problems associated with introduction of a new service, or a depressed economy, could be equally applicable to any new service and should, therefore, not serve as precedent for relief. Second, SMRs must compete with each other for customers. Licensees in the new 900 MHz SMR service may have found it difficult to attract customers because of licensing or equipment disadvantages. It is likely, however, that given time to overcome these disadvantages, legitimate 900 MHz SMR licensees will be able to satisfy our loading requirements. I/LT licensees, on the other hand, do not compete for customers and should only apply for enough channels to satisfy their actual needs. The number of mobiles required by an I/LT licensee is a product of the size of the licensee's business and can not be directly linked to equipment or licensing disadvantages. An I/LT licensee that can not meet our loading requirements, for whatever reason, is essentially warehousing spectrum in hopeful anticipation of long term growth of a business. Basing relief on the premise that a particular business has not grown as much as expected would serve as dangerous precedent and could justify extension of relief to licensees in most any service. 900 MHz SMR licensees are the only licensees that have been subject to a unique licensing scheme that may have impeded their ability to meet the loading requirements and they are the only licensees that warrant the proposed relief. I/LT channels that are being used inefficiently should be recovered and licensed to entities with immediate needs for spectrum. Accordingly, we decline to extend the proposed relief from our loading requirements to I/LT licensees and hereby decline to act upon the letter filed by SIRSA/TELFAC/CICS.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS**A. Reason for action**

9. This proposal is intended to provide some relief from strict loading requirements to the initial licensees of the 900 MHz SMR service.

B. Legal basis

10. Sections 4(i), 303(g), 303(r) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping, and other compliance requirements

11. None.

D. Federal rules which overlap, duplicate or conflict with this rule

12. None.

E. Description, potential impact and number of small entities involved

13. The temporary relief from our strict loading standards will give 900 MHz SMR licensees with initial licenses granted prior to June 30, 1989, some of which are small entities, a better chance to develop their businesses. These licensees are also providing a valuable service to their users which are generally small entities. The proposed action would allow the licensees to continue providing such service. Beyond this, we are unable to quantify the potential effects on small entities. We therefore invite specific comments on this point by interested parties.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

None

VI. PROCEDURAL MATTERS***Ex Parte Rules -Non-Restricted Proceeding***

15. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206 (a).

Comment Dates

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 11, 1992** and reply comments on or before **March 23, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public

inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

17. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

18. For further information regarding this *Notice of Proposed Rule Making*, contact Steve Sharkey, Private Radio Bureau, Land Mobile Microwave Division, Rules Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4,303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154,303, unless otherwise noted.

2. Section 90.631 is amended by revising paragraph (b), and by adding a new paragraph (i), to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations per channel cancels automatically. If a trunked system has channels from more than one category, General Category channels are the first channels to be considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has had authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

(i) For SMRS category trunked systems licensed in the 896-901/935-940 MHz band and initially licensed on or before June 30, 1989, if at the end of the initial five-year license term the trunked system does not satisfy the loading requirements of sub-paragraph (b) of this Section, the licensee will be granted a two-year license renewal. Regardless of the date of grant of the two-year renewal the licensee will be required to fully comply with the minimum five-year loading requirements set forth in sub-paragraph (b) of this Section at the end of the two-year renewal term.